WITHDRAWAL SHEET
Ronald Reagan Library

Collection: Baker, Howard H. Jr.: Files
OA/Box: Box 4
File Folder: Paul Nitze 04/23/1987 [March 1987 – April 1987]

Archivist: kdb
FOIA ID: F1997-066/6, D. Cohen
Date: 08/04/2004

DOCUMENT NO. & TYPE	SUBJECT/TITLE	DATE	RESTRICTION
entire folder			
1. letter	Nitze to H. Baker, 3p	4/5/-	B6
~~2. memo (8706555)~~	~~Nitze to Secretary of State, re the broad interpretation (w/notations), 4p~~ R 3/17/06 F97-066/6 #89	~~3/11/87~~	~~B1~~
~~3. attachment~~	~~re an option regarding ABM Treaty, 1p~~ R " " #90	~~n.d.~~	~~B1~~

RESTRICTIONS

B-1 National security classified information [(b)(1) of the FOIA].
B-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
B-3 Release would violate a Federal statute [(b)(3) of the FOIA].
B-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
B-7a Release could reasonably be expected to interfere with enforcement proceedings [(b)(7)(A) of the FOIA].
B-7b Release would deprive an individual of the right to a fair trial or impartial adjudication [(b)(7)(B) of the FOIA]
B-7c Release could reasonably be expected to cause unwarranted invasion or privacy [(b)(7)(C) of the FOIA].
B-7d Release could reasonably be expected to disclose the identity of a confidential source [(b)(7)(D) of the FOIA].
B-7e Release would disclose techniques or procedures for law enforcement investigations or prosecutions or would disclose guidelines which could reasonably be expected to risk circumvention of the law [(b)(7)(E) of the FOIA].
B-7f Release could reasonably be expected to endanger the life or physical safety of any individual [(b)(7)(F) of the FOIA].
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

PENDING REVIEW IN ACCORDANCE WITH E.O. 13233

Ronald Reagan Library

Collection Name BAKER, HOWARD: FILES

Withdrawer
SMF 4/24/2002

File Folder PAUL NITZE 04/23/1987 [MARCH 1987-APRIL 1987]

FOIA
F97-066/6

Box Number 4

ID	Doc Type	Document Description	No of Pages	Doc Date
2	MEMO	NITZE TO SECRETARY OF STATE RE BROAD INTERPRETATION (F97-066/6 #89)	4	3/11/1987
3	ATTACHMENT	RE AN OPTION REGARDING ABM TREATY (F97-066/6 #90)	1	ND

5/20/09 KDB

PENDING REVIEW IN ACCORDANCE WITH E.O. 13233

Ronald Reagan Library

Collection Name BAKER, HOWARD: FILES

Withdrawer
SMF 4/24/2002

File Folder PAUL NITZE 04/23/1987 [MARCH 1987-APRIL 1987]

FOIA
F97-066/6

Box Number 4

ID	Doc Type	Document Description	No of Pages	Doc Date
2	MEMO	NITZE TO SECRETARY OF STATE RE BROAD INTERPRETATION (F97-066/6 #89)	4	3/11/1987
3	ATTACHMENT	RE AN OPTION REGARDING ABM TREATY (F97-066/6 #90)	1	ND

RONALD W. REAGAN LIBRARY

THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 1 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

DEPARTMENT OF STATE
AMBASSADOR AT LARGE
WASHINGTON

~~SECRET/SENSITIVE~~

DIST.
03/11

S
D
S/ARN
S/S

March 11, 1987

MEMORANDUM

TO: The Secretary

FROM: Paul H. Nitze P.H.N.

SUBJECT: Broad Interpretation

Does the Broader Interpretation Permit a Ballistic Missile Intercept in a Delta 181 Test?

I have given further thought and talked to Abe Sofaer and SDIO lawyers about this issue.

The SDIO plans a second experiment in space early next year following up on last year's successful Delta 180 orbital intercept. The follow-on Delta 181 experiment has been designed within the same ground rules as the Delta 180 experiment, that is within the restrictive interpretation of the ABM Treaty. Under current planning, Delta 181 would involve only sensor experiments. Whenever I ask why DoD is proposing to move to implement the broad interpretation, the answer I get is that one important and representative objective is that the restrictions be relaxed so Delta 181 can be modified to add a test of a space-based kinetic-kill interceptor against a target launched into space from earth.

However, the lawyers have as yet not resolved the issue of whether such a modified Delta 181 Experiment can in fact be justified under the broader interpretation. Some of the problems are outlined below.

To get a better grasp of the issues involved, it is instructive to go through the judgments necessary to justify such an experiment under the broad interpretation:

a. The interceptor involved must be judged to be an "ABM interceptor missile". If it were a missile other than an ABM interceptor, Article VI would bar giving it ABM capabilities or testing it in an ABM mode. That the Delta 181 interceptor can be considered an interceptor, in the prime dictionary meaning of the term, can hardly be doubted. As an ABM interceptor missile, one of the components listed in Article II of the ABM Treaty, tests from a space-based launcher would appear to be precluded by Article V. However, OSD argues:

b. The guidance system can be judged to be based upon other physical principles. This is reasonable since it is based on ultraviolet and infrared homing, not on radar. However, Harold Brown's contention that the SBKKV program technology of today was available and evaluated in the early 1960's in the "BAMBI" program, complicates the persuasiveness of the argument. In addition, the U.S. had a program in 1972 when the Treaty was signed for an infrared-guided interceptor, and no one at the time argued that it was exempt from the ABM Treaty restrictions because of its guidance system. Nor does anyone argue that infrared-guided ground-launched interceptors now being developed are exempt from the Treaty. An important point here is that some argue that the word "other" in "other physical principles" means "other" than those understood in 1972. The Executive Branch holds that "other" means "other" than those used in Article II components.

c. It must be judged that the interceptor with such a guidance system is a hybrid component and, hence, based upon other physical principles. The question of hybrid systems and components arose in the SCC in 1977 but was inconclusive; the U.S. decided not to push it to resolution; we agreed with the Soviets to consult under Article XIII if such an interceptor were created in the future.

d. But if one can sustain the argument that the interceptor is a hybrid based upon other physical principles and therefore a non-ABM interceptor, it is difficult to see why the limitations of Article VI on non-ABM interceptors do not apply. It is argued that Article VI was designed to prevent the upgrading of anti-aircraft systems to an ABM capability; Article VI, however, is written in broad terms to apply to all non-ABM missiles, launchers, and radars.

e. The launcher must also be judged to be a hybrid component. It is argued that this is justified because it carries a sensor based on other physical principles. A long range sensor is necessary to send the missile in the right direction, but placing the sensor on the launcher is merely a convenience. This weakens the claimant logic. There are other obvious problems, including the difficulty of reconciling this concept with the words of Agreed Statement D. The State lawyers have yet to review this argument.

Because of the less than conclusive nature of the above complex chain of argument, some have suggested that the best way to proceed would be to adopt an interpretation broader than the broad interpretation. They argue that if any component of a system is based on other physical principles, then all components of that system are also based upon other physical principles and are therefore exempt from the main articles of the Treaty. A better argument, perhaps, is that if one component is based on other physical principles, then the entire system could be so characterized, but whether the individual components of such a system could be so characterized is much more difficult. I asked whether, by analogy, we would consider the Soviets to be within the Treaty, if they changed final guidance in the Galosh system to guidance based upon other physical principles, and then claimed the right to ignore the Treaty limitations, other than Agreed Statement D, on the thus modified Galosh system and all of its components. Common sense would suggest the answer must be no.

By What Legal Standard Should the Treaty be Judged?

Gerard Smith, John Rhinelander, Tom Graham, and most of the Senators approach the problem of the treaty interpretation from the point of view of the American Law Institute and the Vienna Convention on the Interpretation of Treaties. The U.S. signed the Vienna Convention in April 1969 but has never ratified it.

The Soviets "ratified" the Convention in April 1986 by "acceding" to it. This practice is normally followed when a party has never signed a treaty (which the Soviets never did) but wishes to ratify; such "acceding" would thus satisfy both signature and ratification. Soviet representatives have consistently stated that they consider themselves to be bound only by those obligations they have formally undertaken; in this case, they would appear to be legally bound. They have, however, a long history of stretching even those obligations they have formally undertaken or of considering them to have been overtaken by time or events.

It has long been argued that we should not be bound by an interpretation of obligations under a treaty with the Soviets to which they do not consider themselves bound.

This chain of argument supports the language on which State has long insisted, that the broader interpretation is "fully justified," as opposed to the OSD words "the legally correct interpretation."

Should Option C Be Explored?

Option C has been advanced as a possible way out of the above legal swamp.

A fundamental problem when we negotiated the Treaty, was that the U.S. wished to protect the limitations of the Treaty against possible erosion through systems and components based on technologies other than those incorporated in Article II components. Not understanding what the nature of those technologies might be, we could not define the components or systems based on other physical principles. The United States tried to close this hole by banning devices capable of substituting for Article II components; in that, we failed. Agreed Statement D was a compromise to fill this hole.

It therefore makes sense to revisit Option C in order to work out how one might usefully define components based on other physical principles and how "tested in an ABM mode" should relate to them.

~~SECRET/SENSITIVE~~

Option C

Continue US position on non-withdrawal from the ABM Treaty through 1996 and the right to deploy thereafter unless otherwise agreed. Propose an agreement on the treatment of advanced defenses during this period along the following lines:

a. establish threshholds for devices which are based on other physical principles (OPP) beyond which such devices would be considered "components";

b. base these threshholds on physical phenomena (i.e., for directed energy devices consider power [watts of output] and the size of the optics [diameter in meters]; for kinetic kill vehicles consider velocity);

c. agree that below the threshholds identified, there would be no constraints on testing, but above the threshholds testing would be subject to constraints to be agreed on testing in an ABM mode; and

d. agree that sensors (other than radars) would be free from any constraints on testing except testing in conjunction with a kill mechanism.

~~SECRET/SENSITIVE~~